Supreme Court, U.S.
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No. 86-1829

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ATLANTIC RICHFIELD COMPANY,

Petitioner,

—v.—

INDEPENDENT U.S. TANKER OWNERS COMMITTEE, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENT OVERSEAS SHIPHOLDING GROUP, INC.'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether certiorari should be granted to review the decision below which did nothing more than require the rulemaker adequately to explain the Rule's apparent departure from a long-established statutory scheme.

2. Whether certiorari should be granted to review so unexceptional a judicial decision, where reversal would not resolve the controversy but simply require the court below to pass upon substantial procedural and environmental challenges which have been left undecided.

3. Whether certiorari should be granted, at the behest of a private party, to review a decision sustaining one challenge to the 1985 Rule, where the rulemaker herself chose not to seek review here but to lay aside the 1985 Rule and propose a new 1987 Rule which would permit petitioner's vessels to remain in the protected coastal trades—if the new Rule survives challenge.

4. Whether certiorari should be granted where, as here, legislation has been enacted and signed into law prohibiting use of appropriated funds to promulgate, implement, enforce or even defend both the Rule at issue and its 1987 successor.

RULE 28.1 LISTING

Respondent Overseas Shipholding Corporation is a public company whose non-wholly owned subsidiaries or affiliates are:

Anglomar Shipping Co. Ltd.
Conti-OSG Associates (I through IV)
First United Shipping Corp.
Interocean Tanker Corp.
Moran Maritime Associates
Reliance Shipping B.V.
Second United Shipping Corp.
Spirit Shipping B.V.
Third United Shipping Corp.

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STATEMENT OF THE CASE

Respondent Overseas Shipholding Group, Inc. ("OSG") respectively requests that this Court deny the petition seeking review of the decision of the Court of Appeals for the District of Columbia, entered in *Independent U.S. Tanker Owners Committee v. Dole* on January 16, 1987.

OSG is the largest independent operator of unsubsidized tankers in the Nation's Jones Act fleet. Through subsidiaries, it operates nine unsubsidized tankers in the protected Alaskan trade, on charter to one or another of the three major Alaska

North Slope crude oil producers which together make up the entire trade.

The Background

OSG invested approximately $400 million of its own funds in its Jones Act fleet. When most of these investments were made, it had the option of accepting subsidies for their construction and operation and then serving the Nation's foreign commerce. Instead, after taking into account the number of tankers that were under, or scheduled for, unsubsidized construction, it chose to build without government subsidy and operate its tankers in the protected coastal trades. The Nation's maritime laws have long distinguished between foreign and domestic commerce, and provide that only United States flag vessels built in this country without subsidy, flying the United States flag, and employing United States crews may engage in the coastal trades. This is the so-called "Jones Act fleet."

The price for making the contrary decision—to accept handsome construction and operating subsidies—was exclusion from the coastal trades, including the Alaska trade. This statutory scheme was intended to provide incentives for operators to serve both foreign and domestic commerce. Subsidies were designed to enable United States flag vessels to carry an appropriate share of the Nation's foreign commerce, in competition with foreign vessels. Protection against foreign and subsidized United States vessels was intended to encourage construction and operation of unsubsidized United States flag vessels sufficient to carry the domestic trade.

In the event of temporary situations of undercapacity in the coastal trades, Section 506 of the Merchant Marine Act of 1936, 46 U.S.C. Section 1156, authorized the Secretary to grant *temporary* exemptions permitting individual subsidized tankers, upon repayment of a pro rata share of their subsidies, to participate in the protected trade—but only for nonconsecutive six-month periods. Such exemptions could generally only be granted to vessels of over 100,000 deadweight tons

("DWT"), and then only when all Jones Act vessels of that size were fully employed. In the past decade, some 40 such exemptions have been granted by the Secretary after administrative determinations that market conditions justified them.

On two occasions only, in situations of special hardship, administrators have also approved "permanent" entry into the Alaska trade by a particular vessel. In one case, this Court approved such a permanent exemption for the STUYVESANT. *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572 (1980). In the second case, involving the STUYVESANT's sister ship the BAY RIDGE, the Court of Appeals vacated and remanded the permanent exemption on the ground that in adopting an "interim rule" to deal with applications for permanent exemption, the Secretary had failed to discuss or respond to comments received during the rulemaking process, and had failed to take the necessary "hard look." *Independent U.S. Tanker Owners Committee v. Lewis*, 690 F.2d 908, 919 (D.C. Cir. 1982).

The 1985 Rule

Rather than address the problems identified by the appellate court in 1982, the Secretary attempted to blur the statutory distinction between foreign and domestic commerce and to avoid the legislatively required determination of market conditions with respect to each exemption application. She proposed by Rule that any of the 29 subsidized tankers could, willy nilly, permanently enter the heretofore protected coastal trades—including the Alaska trade—simply by electing to repay subsidy. That "CDS payback" rule, first proposed in 1983 but delayed for two years by temporary legislative prohibitions, was promulgated as a final Rule on May 8, 1985, to become effective after June 6, 1985.

The Proceedings Below

Before the 1985 Rule became final, OSG and other interested parties sought judicial review on the grounds, among others, that the proposed Rule and the Secretary's written explanations conflicted with applicable statutory mandates, that in promulgating the Rule the Secretary had repeated the same procedural errors that had led the appellate court to vacate the BAY RIDGE exemption, and that she had erred in failing to prepare and circulate to interested agencies and parties the required environmental impact statement.

Although the district court denied both temporary and preliminary injunctive relief, it cautioned the operators of subsidized carriers that if they chose to repay subsidy and enter the protected coastal trades before this controversy was finally resolved, they did so at their peril. Several operators, including petitioner Arco, nevertheless elected to repay.

On January 16, 1987, a unanimous Court of Appeals, in an opinion by Judge Robert Bork, vacated the proposed Rule, on the ground that the Secretary had failed to explain how the Rule squared with the statutory purposes set out in the Merchant Marine Act which separates the Nation's foreign and domestic commerce, and—except for temporary exemptions made on the basis of particularized market need—excludes subsidized vessels from the protected coastal trades. In light of this decision, the Court found it unnecessary to reach the other issues raised by those who challenged the Rule—including the Secretary's violation of the Administrative Procedure Act and the Federal laws protecting the environment.

The Secretary's 1987 Rule

The Secretary elected to respond to the Court's decision not by seeking review here, but by proposing a modified Rule that would permit the three vessels that had elected to repay subsidy under the vacated 1985 Rule (the ARCO INDEPENDENCE, the ARCO SPIRIT and the BROOKLYN), as well as the BAY RIDGE, to remain permanently in the coastal trades. The new proposed Rule was promulgated at 46 C.F.R. Part 276, on

April 15, 1987. Interested parties were invited to submit comments by May 15, 1987. Respondent OSG did submit its own comments on May 15, and joined in the comments filed that day by the Independent U.S. Tanker Owners Committee of which it is a member. The new 1987 Rule was first published in the Federal Register on June 22, 1987, and purported to become effective the same day.

On July 11, 1987, the President signed into law the Supplemental Appropriations Act for fiscal 1987, Section 505 of which prohibits use of appropriated funds to implement, enforce or even defend the 1985 and 1987 Rules.

WHY A WRIT OF CERTIORARI SHOULD BE DENIED

Arco's petition should be denied. *First*, Arco misrepresents the basis for the decision of the Court of Appeals. Rather than pioneer, all the Court did was observe that the Secretary had failed adequately to explain how her proposed departure from the statutory vessel-by-vessel exemption system squared with what appeared to be legislative mandates pointing in a contrary direction, and remand for an explanation or some other response. *Second*, since the Court of Appeals did not reach any of the other substantial grounds upon which the proposed Rule had been challenged, the Secretary has elected to promulgate a somewhat different Rule pertaining to four tankers only, and the Supplemental Appropriations Act of 1987 prohibits enforcement of the 1985 and 1987 Rules, the decision below is academic and not ripe for review.

A. Arco misrepresents what the Court of Appeals decided.

In an effort to create an issue worthy of certiorari, particularly in the unsatisfactory procedural posture of this case, Arco has attempted to paint the decision below as marking a radical departure in administrative law. That position neither fairly characterizes Judge Bork's decision, nor does justice to the cavalier nature of the Rule and its administrative rationalization.

Judge Bork simply recalled the objectives explicitly outlined by Congress in Section 1101 of the Merchant Marine Act—which include fostering development and maintenance of an American merchant marine "sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce," "capable of serving as a naval and military auxiliary in time of war and national emergency," etc. At pages 10a-14a, he pointed out that the Secretary's written statement in support of the Rule either ignored these objectives or brushed them aside—even in the face of written comments from the military objecting to the consequences of the proposed Rule.

It marks no departure in administrative law to require rulemakers to obey statutory commands, and when challenged for appearing to contradict those commands, to explain the proposed rule in a satisfactory way. The Administrative Procedure Act so requires. 5 U.S.C. Section 706(2)(A) (1982). And so do this Court's decisions. See, e.g., *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 412-13, 416 (1971).

This result was particularly appropriate where Congress had, in the 1970 legislation creating the subsidy program, expressly noted that unregulated competition and the dictates of the market would deprive the Nation's merchant marine of any role in foreign commerce—a result contemplated with equanimity by the Secretary, but forbidden by Congress. S. Rep. No. 1080, 91st Congress, 2d Sess., reprinted in 1970 U.S. Code Cong. & Ad. News 4188, 4190.

The result below was also especially appropriate where counsel for the Secretary, in the district court, argued that the rule-maker should not be held to the actual arguments and determinations reflected in the written comments accompanying the Rule, but that the legality of the Rule ought to be measured simply on the basis of whether it was "rational." (Tr. at 56-59, Joint Appendix at 355-358) Down that road lies chaos.

B. The procedural posture of this case supports denial of the writ.

First, as previously noted, the Court of Appeals decided only that the Secretary had not explained how the 1985 Rule squared with the governing statutes, with which it seemed to be inconsistent. The Court did not reach the other substantial grounds upon which the Rule was challenged—namely, that the Secretary had failed to comply with the Administrative Procedure Act and had failed to prepare the required environmental impact statement. Should this Court for some reason review the decision below and reverse, the Court of Appeals must still pass upon these alternative challenges. So decision here would not resolve the controversy.

Second, events have overtaken the decision sought to be reviewed. In response to the Court of Appeals' decision, the Secretary, rather than seek review here, proposed a new CDS payback Rule limited to the four vessels which elected to repay subsidy under the former Rules invalidated by the court below, and promulgated a final Rule to that effect on June 22, 1987. As a result, all subsidized vessels—including Arco's—which chose to repay subsidy are now functioning in the Alaska trade pursuant to the new Rule. Validation now of the old 1985 Rule, even if the Secretary were to change her mind and return to it, would have no practical effect. The 1987 Rule is itself being challenged by respondent OSG and others in the District Court for the District of Columbia—and its validity will have to be determined on the basis of the new 1987 record and the explanatory materials made public by the Secretary.

Third, on July 11, 1987, the Supplemental Appropriations Act for fiscal 1987 became law. Section 505 thereof forbids use of funds appropriated under this or any other law for enforcement, implementation or even defense of both the 1985 and 1987 CDS repayment Rules. That statute either suspends these Rules of its own force, or manifests a congressional understanding that the 1985 and 1987 Rules do not comply with the underlying maritime statutes—as the court below concluded. Section 505 states:

"None of the funds appropriated or made available by this or any other Act or otherwise appropriated or made available to the Secretary of Transportation or the Maritime Administrator for purposes of administering the Merchant Marine Act, 1936 . . . shall be used by the United States Department of Transportation or the United States Maritime Administration to propose, promulgate, or implement any rule or regulation, or, with regard to vessels which repaid subsidy pursuant to the rule promulgated by the Secretary May 3, 1985 and vacated by Order of the U.S. Court of Appeals for the D.C. Circuit January 16, 1987, conduct any adjudicatory or other regulatory proceeding, execute or perform any contract, or participate in any judicial action with respect to the repayment of construction differential subsidy for the permanent release of vessels from the restrictions in section 506 . . . *Provided*, That such funds may be used to the extent such expendidture relates to a rule which conforms to statutory standards hereafter enacted by Congress."

In light of this legislation, a grant of certiorari would effectively lead nowhere, even were this Court to reverse.

CONCLUSION

Because the decision of the Court of Appeals does nothing more than require the rulemaker to obey the law and be seen to do so, and because of the unusual administrative and legislative posture of this case, the petition for a writ of certiorari should be denied.

Dated: New York, New York
July 15, 1987

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